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Citation: Breakey, Peter (2016) Don't put it in writing? New Law Journal, 166 (7686). pp. 16-17. ISSN 0306-6479

Published by: Lexis Nexis

URL: <http://www.newlawjournal.co.uk/issuearticles/7686>
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Don't put it in writing?

- When lawyers send emails or texts or make telephone calls which they regard as entirely private, they may nevertheless be at risk of breaching the SRA Code of conduct.
- Counsel for the SRA has recently argued that the Code extends to solicitors' thoughts as well as to their actions.
- The ambiguity of the word 'private' causes difficulties in this area.

A recent decision of the Solicitors Disciplinary Tribunal has provided a useful reminder to solicitors of the need to exercise caution whenever they send an email, even if they believe they are engaged in private correspondence. The same decision also considered the relationship between Principles and Outcomes in the SRA Code of Conduct 2011 ("the Code") and raised what some may consider to be the rather menacing and Orwellian prospect of the SRA pursuing solicitors for 'thought crime'.

Case No. 11380-2015, Solicitors Regulation Authority v Brough, Chaudhary and Story, concerned three former partners of London firm, OH Parsons and Partners. Over a period of around 12 months in 2010 and 2011, while they were still at the firm, they had exchanged a series of emails which contained 'inappropriate and offensive' comments. The precise contents of the emails were not disclosed but they included 'abusive, disparaging and insulting comments about colleagues', contained 'sexual and racial references' and included comments about a colleague's sexual orientation.

All three of the Respondents acknowledged that the messages, which they themselves described as 'infantile', 'puerile' and 'crass', were offensive and unacceptable. They each indicated their regret that they had been sent; but at the same time, all three maintained that the messages were private correspondence, intended to be read only by the recipients. It was argued that this was highly relevant to whether or not there had been a breach of Principle 9 of the Code.

Principle 9 states that [as a solicitor]: "You must run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity;" It is linked to Chapter 2 of the Code which lists six mandatory Outcomes, which solicitors must achieve.

Counsel for the SRA made submissions, to the following effect:

- Firstly, that because the Principles operate at 'a higher level of generality', it is not necessary to show a failure to achieve an Outcome in order to demonstrate breach of a Principle.

- Secondly, that Principle 9 “embraced private communications which failed to encourage respect for diversity,” even if there was no evidence of any accompanying discriminatory conduct.
- Thirdly, that Principle 9 would cover private conversations and potentially private thoughts.
- Fourthly, that emails sent using a firm’s email system must necessarily have been sent while ‘carrying out a role in [a] business’.

Analysis of the submissions

The first point made by the SRA should have been uncontroversial. The Code states explicitly that “The outcomes contained in each chapter are not an exhaustive list of the application of all the Principles.” It clearly cannot be *necessary* to show a failure to achieve an Outcome in order to demonstrate breach of a Principle.

The correctness of the SRA’s second submission hinges on the sense in which the term ‘private’ is used (see further below). If the ‘private’ communication was in the course of business, it is submitted that it must be correct that there is no need for any accompanying conduct.

The third submission is a development which may concern many solicitors. Counsel for the Respondents warned of a ‘steep and slippery slope involving the policing by the SRA of private thoughts and actions’. The impracticality of policing people’s thoughts may mean that, at least for the time being, this is largely a theoretical point, nevertheless it seems likely that many solicitors would be shocked by the possibility that they could be disciplined for something which they are only thinking about.

Considered superficially, the relevant wording of the Principle – ‘You must run your business or carry out your role in the business’ suggests that it is targeted at actions rather ‘mere’ thoughts. One can see, however, that it could easily be argued that a person’s thinking is part of how they run a business and how they carry out their role in it. The wording of the Principle is clearly open to different interpretations. A ‘narrow’ purposive approach would presumably lead to thoughts being excluded from its scope. If, however, the purpose of the Principle was to change attitudes just as much as it was to change behaviour, then inappropriate thoughts could be deemed to be covered.

It might also concern solicitors if it were held - as per the 4th submission - that any communication using the firm’s email system (and presumably therefore also the firm’s telephone system) were deemed automatically to have been sent ‘while carrying out a role in the business.’ This would be a sweeping and potentially draconian rule. The Tribunal did not accept that it applied.

The Tribunal's decision

The Tribunal decided that it “could not be sure that these Respondents had breached Principle 9 and the allegation was not proved.” While the Tribunal may have reached the correct decision, the reasons it gave, certainly if analysed purely on a linguistic level, do not stand up to scrutiny.

The Tribunal stated that it accepted that the emails were intended to be ‘private in nature’. (The distinction, if there is one, between what is private and what is ‘private in nature’ was left unstated.) It then stated its reluctance to ‘extend the scope of Principle 9’ to the extent that ‘any misplaced private comments (let alone private thoughts) were sufficient to prove a breach, unless there was some external or public conduct which demonstrated a failure to encourage diversity and equality.’

This is confused. Principle 9 does not refer to privacy. It refers to running a business and to business conduct. Counsel for the SRA had accepted that the emails were ‘private’ emails but argued that because they were exchanged between Managers of the Firm, the partners, when sending them, were carrying out their role in the business and fell within the scope of the Principle. In other words, the fact that a communication was ‘private’ did not prevent it being carried out as part of someone’s role in the business.

The difficulty here stems from the ambiguity of the word private. The OED gives several definitions, of which two are particularly relevant here. The first - *(Of a conversation, activity, or gathering) involving only a particular person or group, and often dealing with matters that are not to be disclosed to others* seems to be clearly applicable to the emails which were sent. It may be that this is what the Tribunal meant when it referred to the emails as being private ‘in nature’

The second dictionary definition: *Not connected with one’s work or official position* is however the only meaning which is relevant for the purposes of the application of Principle 9. If the emails were private in this sense, and not ‘connected with’ the partners’ work, then it is difficult to see how Principle 9 could possibly apply. Counsel for the Respondents was surely correct to argue that the Principle had been carefully drafted to cover business related activities and not to impose a ‘widely defined obligation generally on the conduct of [all those] on the Roll”.

Was Counsel for the Respondents also correct to argue that there must be some ‘manifestation or conduct’, beyond any ‘private’ comments that showed some failure to do as the Principle requires, i.e. ‘encourage equality of opportunity and respect for diversity’? The Tribunal, albeit not wholeheartedly, seemed to accept this proposition when it stated that it was reluctant to ‘extend the scope’ of the Principle ‘to the extent that any misplaced

private comments were sufficient to prove a breach, unless there was some external or public conduct which demonstrated a failure to encourage diversity and equality.'

Again, this approach makes little sense. If, when the Tribunal refers to 'private' comments, it is using 'private' in the second sense given above, then the comments do not fall within the scope of the Principle and there has been no breach. If, on the other hand, the Tribunal is using 'private' in the first of the two senses given above, the question it should then ask itself is whether or not the comments were made by people while they were running their business or while they were carrying out their role in the business. If the answer to that question is 'Yes' there is no requirement for any 'external or public conduct'; sending the emails is, of itself, conduct which constitutes a breach of the Principle.

It would no doubt be unwise to attach too much importance to a single SDT decision. This case is however a useful reminder to solicitors to be aware that the professional standards, to which they are expected to adhere, may apply in a wider range of situations than is commonly realised. While the prosecution of lawyers for thought crimes may still be some way off, the prospect of inappropriate thoughts being policed raises interesting and difficult ethical questions. The precise meaning of the word private in this particular context is important. It would be helpful if both counsel and judges could be careful to make their intended meaning clear.